IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| DONNA L. COLAVITO | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| KENNETH S. APFEL, Commissioner of the Social Security Administration | : | NO. 99-854 |

**MEMORANDUM AND ORDER**

BECHTLE, J. OCTOBER , 1999

Presently before the court are plaintiff Donna L. Colavito's ("Plaintiff") Objections to the Magistrate Judge's Report and Recommendation. For the reasons set forth below, the court will approve and adopt the Report and Recommendation.

## I. BACKGROUND

This is a judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying Plaintiff's claim for supplemental security income ("SSI") under Title XVI of the Social Security Act.

Plaintiff was born on October 20, 1948 and was forty-eight years old at the time of the hearing before the Administrative Law Judge on June 27, 1996. (R. at 35 & 40.) Plaintiff's education terminated in the tenth grade. (R. at 40-41.) Plaintiff testified that she attended special education classes and that she had not worked in the fifteen years prior to the

hearing.[1] (R. at 40-42.)

Plaintiff asserted that she suffers from depression, heart palpitations and back conditions including arthritis and degenerative disc disease.[2] (R. at 44.) On September 19, 1994, Plaintiff filed for SSI, alleging a disability that began on May 18, 1989. (R. at 17-18, 68 & 114) This claim was denied initially and again upon reconsideration. On June 27, 1996, Plaintiff testified at a hearing before Administrative Law Judge Hazel C. Strauss (the "ALJ"). A vocational expert ("VE") also testified at Plaintiff's hearing. (R. at 56-62.) On September 19, 1997, the ALJ found that Plaintiff had not been under a disability as defined by the Social Security Act at any time

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[1] There is no evidence in the record to substantiate Plaintiff's claim that she attended special education classes. (R. at 21 & 41.)

[2] Plaintiff was first treated for depression in 1994. (R. at 46-47 & 130-31.) In June 1995, Plaintiff began treatment at the Life Guidance Center where she saw a therapist every other week. (R. at 46.) Plaintiff testified to no adverse side effects from the medication she takes for her depression and, in fact, stated that it calms her. (R. at 55.)

Plaintiff was also treated by her primary care physician, Dr. Dan Teano, M.D., who concluded that Plaintiff suffered from depression and had previously suffered from questionable mild degenerative joint disease of the cervical spine. (R. at 130-31.) Dr. Teano treated Plaintiff for chest pain and found that she demonstrated normal ventricular size and function, no significant arrhythmia, no cardiac chamber enlargement, no evidence of significant mitral valve prolapse, and minimal mitral insufficiency. (R. at 130-31 & 180-81.) Plaintiff's treating cardiologist, Dr. Jonathon Felsher, M.D., determined that her heart palpitations were benign and that she had "only a very minimal heart problem which is causing no real problems." (R. at 128-29.)

through the date of the decision. (R. at 27.) In her decision denying Plaintiff benefits, the ALJ found that Plaintiff could perform simple one-to-two step jobs that are low stress and do not deal with the public, including: janitress and hotel maid or packer at the light and medium exertional levels.[3] (R. at 26-

[3] The ALJ also made the following Findings of Fact and Conclusions of Law:

1. The claimant has not engaged in substantial gainful activity since September 19, 1994.

2. The medical evidence establishes that the claimant has severe anxiety and depression, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

3. The claimant's subjective complaints are credible only to the extent that they are supported by the evidence.

4. The claimant has the residual functional capacity to perform the nonexertional requirements of work except the jobs must be simple one-to-two-step jobs which do not involve dealing with the public and low stress level jobs. There are no exertional limitations (20 C.F.R. §416.945).

5. The claimant has no past relevant work.

6. The claimant is 49 years old, which is defined as a younger individual (20 C.F.R. §416.943).

7. The claimant has a limited education (20 C.F.R. §416.964).

8. The claimant does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work (20 C.F.R. §416.968).

9. If the claimant's nonexertional limitations did not significantly compromise her ability to perform work at

(continued...)

27.) On July 27, 1999, United States Magistrate Judge Peter B. Scuderi ("Magistrate Judge") issued a Report and Recommendation finding that substantial evidence existed to support the ALJ's findings. On August 9, 1999, Plaintiff filed Objections to the Magistrate Judge's Report and Recommendation.

## II. LEGAL STANDARD

Judicial review of administrative decisions is limited. The court may not re-weigh the evidence. The court determines only whether the Commissioner's decision is supported by substantial evidence. Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (citations omitted). Substantial evidence is

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[3](...continued)

> all exertional levels, Section 204.00, Appendix 2, Subpart P, Regulations No. 4 indicates that a finding of not disabled would be appropriate. If her capacity to work at all levels were significantly compromised, the remaining work which she would functionally be capable of performing would be considered in combination with her age, education, and work experience to determine whether a work adjustment could be made.
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> 10. Considering the types of work which the claimant is still functionally capable of performing in combination with her age, education and work experience, she can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy. . . .
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> 11. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. §416.920(f)).

(R. at 26-27.)

"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987). Findings of fact made by an ALJ must be accepted as conclusive, provided that they are supported by substantial evidence. 42 U.S.C. § 405(g). In reviewing a decision of the ALJ, the court "need[s] from the ALJ not only an expression of the evidence s/he considered which supports the result, but also some indication of the evidence which was rejected." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981) (remanding case back to Secretary of Health and Human Services where ALJ failed to explain implicit rejection of expert medical testimony that was probative and supportive of disability claimant's position). The Third Circuit has recognized that "there is a particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record." Id. at 706. The court reviews de novo the portions of the Magistrate Judge's Report and Recommendation to which objections are filed. 28 U.S.C. § 636(b)(1)(C).

## III. DISCUSSION

To receive disability insurance benefits, a claimant must show that he or she is unable to:

> engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less

> than 12 months. . . . [The impairment must be so severe that the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. §§ 423(d)(1)(A) & (d)(2)(A).

An ALJ considering a claim for disability insurance benefits undertakes the five-step sequential evaluation of disability claims set forth in 20 C.F.R. § 404.1520. Under Step One, if the claimant is working and the work constitutes substantial gainful activity, the ALJ must find that the claimant is not disabled regardless of medical condition, age, education or work experience. 20 C.F.R. § 404.1520(b). Under Step Two, the ALJ determines whether the claimant has a severe impairment which significantly limits his or her physical or mental ability to do basic work activity. 20 C.F.R. § 404.1520(c). Under Step Three, the ALJ must determine whether the claimant's impairment meets or equals the criteria for a listed impairment as set forth in 20 C.F.R. pt. 404, subpt. 4, Appendix 1. 20 C.F.R. § 404.1520(d). Under Step Four, if the ALJ finds that the claimant retains the residual functional capacity to perform past relevant work, the claimant will not be found to be disabled. 20 C.F.R. § 404.1520(e). Under Step Five, other factors, including the claimant's residual functional capacity, age, education and past work experience must be considered to determine if the claimant can perform other work in the national economy. 20 C.F.R. § 404.1520(f).

Plaintiff asserts two principal grounds on which the Magistrate Judge's and the ALJ's findings are not supported by

substantial evidence. First, Plaintiff asserts that the Magistrate Judge improperly rejected the medical opinions of Dr. Misook Soh, M.D., Plaintiff's treating psychiatrist. Second, Plaintiff argues that the VE's hypothetical did not include all of her impairments. The court will review each argument separately.

**A. Dr. Soh's Opinion**

Plaintiff's principal objection revolves around evidence of the purported findings of a person identified as Dr. Misook Soh, M.D., and claimed by Plaintiff to be one of her treating physicians. Dr. Soh did not testify at the hearing.

Documents claimed by Plaintiff's counsel at the hearing to be the reports of Dr. Soh were submitted in support of Plaintiff's claim. (R. at 155, 216 & 233.) The ALJ was skeptical about the genuineness of certain of the reports that were submitted, and her observations in that regard are set forth in her decision.[4] (R. at 21-22.) In addition to her concerns regarding the authenticity of the reports, the ALJ was not satisfied with the content of the documents because some were essentially "check off" forms filled in by someone that may, or may not have been, Dr. Soh. (R. at 216.) Some of Plaintiff's

[4] The ALJ found that the "check-off" medical assessment forms purportedly submitted by Dr. Soh were not credible, not consistent and not substantiated by treatment records. (R. at 21-22.)

records were filled in by her social worker, Virginia W. Dryer, and signed off by Dr. Soh. (R. at 151, 186-192 & 219-224.) Under the regulations, a social worker's opinion is not listed as an "acceptable medical source." See 20 C.F.R. § 416.913(a) (listing acceptable medical sources); Lee v. Sullivan 945 F.2d 687, 691 (4th Cir. 1991)(finding that chiropractor is not "acceptable medical source" under 20 C.F.R. § 416.913(a), and therefore is not qualified to make medical assessment).

The ALJ provided Plaintiff's counsel at the hearing with an opportunity to supplement Plaintiff's deficient medical records with the original medical and laboratory notes. (R. at 22 fn.1 & 55.) Such treatment records are customarily expected and are provided to support cursory forms that often do little more than inform the reader of pre-printed terms of a medical diagnosis. Cf. 20 C.F.R. § 404.1527(d)(2)(stating that to receive controlling weight, treating source's opinion must be "well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence"); § 416.927(d)(2)(same); Santise vs. Schweiker, 676 F.2d 925, 932-933 (3d Cir. 1982)(recognizing authority of Secretary of Health and Human Services to "establish regulations governing determinations of disability" and "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and

the method of taking and furnishing the same in order to establish the right to benefits")(internal quotations omitted); Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993)(finding that forms requiring physician only to check boxes or fill in blanks are "weak evidence at best" and that when such forms are unaccompanied by thorough written reports, "their reliability is suspect")(internal quotations omitted). Plaintiff's counsel at the hearing accepted the ALJ's offer to supply Plaintiff's medical records, but failed to do so. Substitute counsel, who is Plaintiff's current counsel before the court and represented Plaintiff before the Appeals Council, also failed to supply the requested documentation. Indeed, even throughout the proceedings in this court, the material has not been provided. The court agrees with the United States Magistrate Judge that the ALJ, as well as the Appeals Council, were wholly justified in not giving the weight to Plaintiff's medical documents that Plaintiff believes they deserve. See Matullo v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990)(recognizing that court may accept credibility findings of ALJ).

Plaintiff also objects on the ground that the record was not fully developed as is required when benefits are denied. The Federal Regulations provide that before a determination is made that a claimant is not disabled, the Commissioner should insure that the claimant's complete medical history has been developed.

20 C.F.R. § 416.912(d). Those regulations provide that the complete medical history are records of the claimant's medical sources for the 12 months or more preceding the month in which the claimant's application is filed. Id. If the evidence before the Commissioner is insufficient, he is to attempt to secure additional evidence to determine whether a claimant is disabled. 20 C.F.R. § 416.927(c)(3). The Commissioner is to request additional records, re-contact treating sources, ask the claimant for more information or undergo a consultive examination. Id. Plaintiff's counsel contends that the ALJ failed to complete the record as required by the Federal Regulations. See 20 C.F.R. § 404.1512(e)(1) & (f)(stating that "[w]e will seek additional evidence or clarification from your medical source when the report from your medical source . . . does not contain all the necessary information" and that "every reasonable effort" will be made to obtain evidence from medical sources). However, it is plain that the ALJ did all that she could to have the record completed and that it was Plaintiff who failed to furnish the necessary information. The opportunity that the ALJ furnished Plaintiff's counsel to strengthen the credibility of Plaintiff's case was not a failure of the tribunal to complete the record.

A review of the record in this case demonstrates that the record was sufficiently clear and complete for the ALJ to render a decision regarding Plaintiff's disability. The ALJ went to considerable trouble to assure that a complete record was before

her. (Rep. & Recomm. at 19 n. 21 (observing that ALJ left record open for two weeks after administrative hearing to give Plaintiff extra time to submit treatment notes).) Further, the ALJ sent Plaintiff for three consultive medical status examinations in accordance with the regulations. (R. at 19-21.) The examinations covered a span of two years, and coupled with the other information before the ALJ, furnished more than sufficient information for the ALJ to decide the claim. Thus, Plaintiff's objection on this ground is without merit.

**B. The ALJ's Hypothetical**

Plaintiff also objects that the content of the hypothetical question presented at the hearing was incorrect. The court has examined the record and concludes that based upon the entire record before the ALJ, the hypothetical question presented to the VE was well within the acceptable range for such questions. See Podedworny v. Harris 745 F.2d 210, 218 (3d Cir. 1995)(noting that ALJ will tailor hypothetical to simulate plaintiff's limitations and abilities, and ask whether suitable job exists for plaintiff in national economy). Testimony of a VE constitutes substantial evidence for purposes of judicial review where a hypothetical question considers all of a claimant's impairments that are supported by the medical record. See Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987) (stating that "[a] hypothetical question must reflect all of a claimant's impairments that are supported by the record; otherwise the question is deficient and

the expert's answer to it cannot be considered substantial evidence"). Hypothetical questions need only include the factors that are supported by objective medical evidence contained in the record. Id. at 1271. It is not necessary for the ALJ to include facts that are supported by a claimant's subjective testimony only. Id.

In this case, the hypothetical question demonstrates that the ALJ took into consideration the credible factors in the record that were necessary for the VE to render an opinion. (R. at 57-63.) The reference in that opinion and in the ALJ's findings relating to light or middle exertional limitations, as well as facts in evidence concerning Plaintiff and a description of the various vocational opportunities available in the national and regional economy, make it clear that the hypothetical question was in accordance with the necessary legal standard. Thus, Plaintiff's objection on this ground is without merit.

## III. CONCLUSION

Based upon the foregoing reasons, the Magistrate Judge's Report and Recommendation shall be approved and adopted.

An appropriate Order follows.

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| Commissioner of the | : | |
| Social Security Administration | : | NO. 99-854 |

**ORDER**

AND NOW, TO WIT, this day of October, 1999, upon consideration of plaintiff Donna L. Colavito's and defendant Kenneth S. Apfel, Commissioner of the Social Security Administration's cross-motions for summary judgment, and after careful review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi and the Objections thereto, IT IS ORDERED that:

1. the Report and Recommendation is APPROVED and ADOPTED;
2. plaintiff Donna L. Colavito's motion for summary judgment is DENIED; and
3. defendant Kenneth S. Apfel, Commissioner of the Social Security Administration's motion for summary judgment is GRANTED. Judgment is entered in favor of defendant Kenneth S. Apfel, Commissioner of the Social Security Administration and against plaintiff Donna L. Colavito.

LOUIS C. BECHTLE, J.